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January 22, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: Public Comments on Issues of Indecency and Political Advertisements in Television Broadcasting

Dear Ms. Searcy:

The American Civil Liberties Union submits the enclosed comments pursuant to the Commission's request for public comment concerning indecency and political advertising in television broadcasting (MM Docket No. 92-254).

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION

By: Robert S. Peck
Robert S. Peck

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling	)	MM Docket No. 92-254
Concerning Section 312(a)(7)	)	
of the Communications Act	)	

To: The Commission

COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION

INTRODUCTION

These comments are submitted by the American Civil Liberties Union, a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and, most particularly, in the Bill of Rights. Throughout its 70-year history, the ACLU has been particularly concerned with any abridgement of the freedoms guaranteed by the First Amendment and has frequently litigated to vindicate those rights before the United States Supreme Court and other federal and state courts.

These comments are submitted in response to the request of the Commission concerning:

> [W]hat, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent.
>
> [W]hether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children.

This proceeding arises out of an Application for Review, filed by Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer"), of action taken by the Chief of the Mass Media Bureau in a letter dated August 21, 1992, which declined to find that graphic depictions of dead or aborted fetuses and bloody fetal tissue contained in the political advertisements of a federal candidate constituted indecent material and thus was exempt from the "reasonable access" provision of Section 312(a)(7) and the "no censorship" provision of Section 315(a).

The ACLU urges the Commission to uphold the letter ruling denying the sought after relief in the Kaye, Scholer petition. Graphic depictions of fetuses or fetal tissue do not constitute indecent broadcast material under the Commission's present definition. Furthermore, an expanded indecency definition that would encompass these advertisements or other political advertising that some might deem unsuitable for children would constitute a serious infringement of First Amendment rights and undermine the goals of the Communications Act in fostering expanded political discourse.

DISCUSSION

I. The broadcast of political advertising that includes graphic anti-abortion images does not satisfy the Commission's indecency definition and should not be subject to late-hour channeling. The Petition for Declaratory Ruling of July 29, 1992 filed by Kaye, Scholer hamhandedly attempts to fit images of fetuses and

fetal tissue within the rubric of indecency in order to avoid the daytime or early evening broadcast of distasteful political advertising. Such an approach cannot stand close scrutiny either on constitutional grounds or in applying the Commission's own definitional standards.

It is axiomatic that speech does not lose its constitutional protection because it appears in a disturbing form or even because an overwhelming majority in a community regards it as unbecoming or unseemly. Instead, the guarantees of freedom of speech are most urgently implicated in precisely those circumstances. See United States v. Schwimmer, 279 U.S. 644, 654-655 (1929)(Holmes, J., dissenting)("if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate."). As the Court said recently, "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment." Boos v. Barry, 485 U.S. 312, 322 (1988). It remains a bedrock principle underlying the First Amendment that speech that is "offensive or disagreeable" may not be burdened for that reason. Texas v. Johnson, 491 U.S. 397, 414 (1989). See also Street v. New York, 394 U.S. 576, 592 (1969).

These principles place an enormous burden on those who would regulate speech. Any attempt to fit these advertisements or

similarly unsettling political commercials within the guise of the Commission's indecency authority actually seeks an expansion of that authority. The Commission's present definition of indecency cannot support inclusion of the bloody fetuses, fetal tissue, or abortions.

The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705, 2705 (1987). The Kaye, Scholer petition asserts that graphic depictions of bloodied or aborted fetuses or of bloody fetal tissue "constitutes the depiction of an excretory activity." Petition for Declaratory Ruling at 15; see also Gillett Communications Petition for Declaratory Ruling of July 28, 1992 at 6. The Kaye, Scholer petition rests this bold assertion on where a fetus or fetal tissue comes from; specifically, as an "expulsion" from a human body. Petition at 15.

To the contrary, neither a fetus nor fetal tissue can properly fit within the plain meaning of excrement or excretion. The dictionary defines "excrement" to be "waste matter discharged from the body." Webster's New Collegiate Dictionary 395 (1979). An "excretion" is "useless, superfluous, or harmful material (as urea) that is eliminated from the body and that differs from a secretion in not being produced to perform a useful function."

Id. at 396. The results of an abortion, which the advertisements purport to show, are not the results of an excretory activity but of a medical procedure. Neither a fetus nor fetal tissue fit within the plain meaning of excrement or excretion. Abortion is not an excretory activity.

Were the Commission to expand the definition of excretory activity to embrace an aborted fetus, fetal tissue or footage purporting to be an abortion, the result would be to include as well a variety of activities commonly portrayed on television. We note that tooth extraction is a classic comedy routine involving pain and discomfort that was used in many early television broadcasts like "The Three Stooges" and "I Love Lucy." Childbirth, realistically portrayed by sweating, exerting mothers, often in pain from the effort, is a staple of many medical and other dramas, and situation comedies that have graced the airwaves. If a fetus is the result of an "excretory activity," then both a removed tooth and a newborn would be also. No doubt, the depiction of these "excretory activities" could give discomfort to some and might be viewed by parents as inappropriate for their children; yet, to describe them as indecent and subject to Commission regulation and sanction would be to deny First Amendment coverage to clearly protected speech.

Expanded coverage for the Commission's indecency authority would also have drastic consequences for news coverage of important public issues such as abortion, AIDS and fetal tissue research, as well as protests about existing policies on these

issues. At these protests, graphic depictions much like the advertisements at issue here appear on signs and placards. We suggest that it would be improper and unconstitutionally chilling to cause news directors to censor their coverage of such events because of the fear that these displays would subject them to sanctions under the Commission's indecency authority. Moreover, the dramatization of these events from our public lives would similarly be chilled by such expanded authority.

Instead, we suggest that the letter ruling of the Chief of the Mass Media Bureau on this petition is correct in holding that "[n]either the expulsion of fetal tissue nor fetuses themselves constitutes 'excrement.'" Letter from Roy J. Stewart, Chief, Mass Media Bureau to Messrs. Vincent A. Pepper and Irving Gastfreund (Aug. 21, 1992).

The very fact that a serious petition could be filed with the Commission to attempt to bring political speech of this kind under the rubric of indecency once again demonstrates the inherent vagueness of indecency as a standard for broadcast regulation. See Action for Children's Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988)(ACT I). Rulings on indecency have been sufficiently inconsistent and confusing that licensees have been warned against relying on the Commission's own precedents "unless both the substance of the material they aired and the context in which it was broadcast were substantially similar." In re Liability of Sagittarius Broadcasting Corp., 71 Rad. Reg. 2d (P&F) 630 (released Oct. 23, 1992). This pattern of

construction and application renders the indecency definition unconstitutionally vague. Expansion of the definition would remove whatever core remains to the concept of indecency and would leave in its place an authoritative construction without any "ascertainable standard for inclusion and exclusion." Smith v. Goguen, 415 U.S. 566, 578 (1974). Such expansion could not withstand constitutional scrutiny.

II. A "harmful to minors" rationale, whether based on indecency or other authority, cannot justify evasion of the Communications Act's "reasonable access" and non-censorship requirements for the political advertisements of federal candidates. 47 U.S.C. §§312(a)(7) and 315. These requirements are a reflection of concerns that are as old as the federal role in broadcasting. As Congress was debating what became the Radio Act of 1927, Congressman Johnson warned that "[i]f the strong arm of the law does not prevent monopoly ownership and make discrimination by [broadcasting] stations illegal, American thought and politics will be largely at the mercy of those who operate these stations." 67 Cong. Rec. 5558 (1926). The modern "reasonable access" and no-censorship requirements grew out of that sentiment.

Use of indecency or the concept of "harmful to minors" as a good faith standard by which broadcasters might channel offensive political advertising effectively gives broadcasters a license to discriminate on the basis of political ideas, a result that the no-censorship requirement and constitutional principles directly

contradict. The Constitution's protection of expressive freedom represents a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 270 (1964). The graphic political advertisements focusing on abortion, like the civil rights advertisement that gave rise to the speech dispute in Sullivan, can be said to represent "an expression of grievance and protest on one of the major public issues of our time." Id. at 271. As such, it involves speech "at the heart of the First Amendment's protections." First Natl'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).

The Court has repeatedly recognized that "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." Eu v. San Francisco Democratic Comm., 489 U.S. 214, 223 (1989), (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)). Any regulation that would "curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press." Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 546 (1980)(Stevens, J., concurring)(footnote omitted). These principles apply fully to the broadcast medium, as the Court said in upholding Section 312(a)(7): "speech concerning public affairs is . . . the essence of self-government." CBS, Inc. v. FCC, 453

U.S. 367, 396 (1981), (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). In CBS, the Court stated that "Section 312(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." 453 U.S. at 396.

One could easily imagine a federal candidate running for office because he or she is dissatisfied with the U.S. response to the carnage in Bosnia. Incorporating news footage of the death and destruction there into a political advertisement, the candidate would hope to raise public consciousness and sympathy for a more activist policy, as well as election to an office that might have influence over the government's stance. One could also imagine that the graphic scenes incorporated into the advertisement would prove unsettling to some and raise a concern about how disturbing it might prove to children. However, a Commission ruling that would permit such speech to be channeled to late hours would effectively deny certain audiences to the candidate that may be critical to effecting a policy change. Such a result clearly violates free-speech principles.

Moreover, by ceding such authority to the licensee, the Commission would be enabling some to exercise something akin to a "heckler's veto" and violate the free-speech principle that bars content-discrimination. See, e.g., Police Department v. Mosley, 408 U.S. 92, 95-96 (1972)("government has no power to restrict expression because of its message, its ideas, its subject matter,

or its content. . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."). Those offended by the advertisement and those opposed to the controversial position staked out by the candidate could use this grant of authority to convince a broadcaster to banish the advertisement to safe harbor hours when a candidate is less likely to reach as large a group of likely voters. Such a result would be anathema to the nation's commitment to free speech.

We note that the petition for channeling authority submitted by Gillett Communications involved an advertisement that sought broadcast during "60 Minutes," a popular news program whose viewers a candidate might justifiably assume have a heightened interest in public affairs. It is not illogical for a candidate to want to reach viewers already interested in public affairs programming or, for that matter, broadly popular entertainment programming. Indeed, the Commission has previously recognized that candidates have an interest in reaching audiences during the day and during prime time and have construed the reasonable access requirement to afford such rights. Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079, 1090 (1978).

It is worth noting that speech that is "indecent but not obscene is protected by the First Amendment" and may only be regulated to serve a compelling interest by means "carefully tailored to achieve those ends." Sable Communications v. FCC, 492

U.S. 115, 126 (1989). A scheme is insufficiently tailored if it denie[s] adults their free speech rights by allowing them to read only what was acceptable for children." Id., citing Butler v. Michigan, 352 U.S. 380 (1957). Because of the importance of political speech to the process of self-government, a harmful-to-minors rationale cannot justify narrowing the discourse available to adults on one of the most important issues of our time.

Upholding these First Amendment principles does not leave broadcasters without options. The ACLU agrees with the letter ruling suggestion that broadcasters that have a good-faith concern that the material could be disturbing to children may precede the advertisement with an advisory, "presented in a non-editorializing and neutral fashion." Letter from Roy J. Stewart, Chief, Mass Media Bureau to Messrs. Vincent A. Pepper and Irving Gastfreund (Aug. 21, 1992). Such an advisory properly alerts viewers to the nature of the material, leaving it to them to decide whether to continue viewing, while protecting the First Amendment rights of the candidates. If a broadcaster chooses to add an advisory, it should be done without any imposition on the costs or time allotment for broadcast of the political advertisement.

CONCLUSION

For the reasons stated above, the American Civil Liberties Union respectfully requests that the Commission decline to expand its definition of broadcast indecency to include disturbing or graphic political advertisements on controversial subjects such as abortion. Furthermore, the Commission should deny broadcast licensees the authority to channel such advertisements to safe harbor or late night hours and instead continue to apply the mandates of Sections 312(a)(7) and 315(a) to these advertisements.

Respectfully submitted,

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